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KEYBANK, N.A.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

JEFFREY A. NEEDELMAN,
Plaintiff,
vs.
PENNSYLVANIA HIGHER EDUCATION
ASSISTANCE AUTHORITY dba
AMERICAN EDUCATION SERVICES,
KEYBANK, N.A.; AND EDUCATION
CREDIT MANAGEMENT SERVICES,
Defendants.

Case No.: 08 CV 00442 L RBB

Hon. M. James Lorenz

**NOTICE OF MOTION AND
MOTION TO DISMISS [12(b)(6)] BY
DEFENDANT KEYBANK, N.A.**

[Memorandum of Points and Authorities;
Request for Judicial Notice filed
concurrently herewith]

Date: June 30, 2008
Time: 10:30 a.m.
Place: Courtroom 14

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on **June 30, 2008 at 10:30 a.m.**, or as soon thereafter as the matter may be heard, defendant **KEYBANK. N.A. ("Keybank")** will and hereby does move in Courtroom 14 of the above-entitled court, located at 940 Front Street, San Diego, California, for an order dismissing plaintiff's complaint and each cause of action therein for

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1 failure to state a claim upon which relief can be granted, under Federal Rules of Civil
 2 Procedure Rule 12(b)(6).

3 Dismissal pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) is proper where
 4 the claim is not based on a cognizable legal theory or where there are insufficient facts
 5 alleged to support cognizable claim.

6 Plaintiff's First Cause of Action for Declaratory Relief seeks a declaration that his
 7 student loans were discharged in a Chapter 13 bankruptcy proceeding. Declaratory relief is
 8 only proper where it will resolve an actual controversy or uncertainty. There is no
 9 uncertainty that Plaintiff Needelman's student loans have never been discharged. There was
 10 no adversary proceeding in Plaintiff Needelman's bankruptcy proceeding which adjudicated
 11 any putative defense to Plaintiff's student loans. Nor is there any order from Plaintiff
 12 Needelman's bankruptcy proceeding discharging Plaintiff's student loan debt. To the
 13 contrary, the bankruptcy court's discharge order relied upon by Plaintiff Needelman expressly
 14 excluded student loan debt. There are no facts to support Plaintiff's claim for declaratory
 15 relief.

16 Plaintiff's Second Cause of Action for Reimbursement seeks reimbursement of
 17 payments he has made on his student loans following the conclusion of his Chapter 13
 18 bankruptcy proceeding. Reimbursement is a claim for unjust enrichment under a quasi-
 19 contractual theory, which is inappropriate where there is a written contract that expresses the
 20 parties' obligations. Here, Plaintiff Needelman entered into a written loan agreement, which
 21 defines the parties' obligations. Additionally, Plaintiff's student loans were not discharged
 22 and he is obligated to make payments under the terms of the agreement. There are no facts to
 23 support plaintiff's claim for reimbursement.

24 PLEASE TAKE FURTHER NOTICE that pursuant to Local District Rule 7.1, parties
 25 who wish to oppose this Motion shall, not later than fourteen (14) days prior to the date of the
 26 hearing, file with the Clerk of the United States District Court for the Southern District of
 27 California, located at 880 Front Street, San Diego, California 92101-6998, and serve on
 28

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counsel for KEYBANK, N.A., a brief but complete written statement of all reasons in opposition to the documentary evidence on which the responding party intends to rely. In accordance with Local Rule 90137.1, papers not timely filed and served may be deemed by the Court as consent to the granting of the Motion to Dismiss.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities filed in support hereof, the Request for Judicial Notice, and such other and further evidence and argument as may be presented at the hearing on this motion.

WHEREFORE, Defendant KEYBANK, N.A., prays that this Court grant its Motion to Dismiss and for such further relief as the Court deems just and proper.

Dated: May 19, 2008

COX, WOOTTON, GRIFFIN,
HANSEN & POULOS, LLP
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KEYBANK, N.A.

By: s/Rupert P. Hansen
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